UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION NO. 7:14-CV-61-D

VICTORIA GALBREATH,)
Plaintiff,)
v.	DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
TIME WARNER CABLE INC.,)
Defendant.	<i>)</i>)

Defendant Time Warner Cable Inc. ("Defendant"), pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves for summary judgment as to the claims alleged in the Complaint of Plaintiff Victoria Galbreath ("Plaintiff") on the grounds that there is no genuine issue of material fact and Defendant is entitled to judgment as a matter of law. In support of this Motion, Defendant shows the Court the following:

- 1. Plaintiff filed this action to recover statutory damages under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. ("TCPA"), for calls Defendant made to her cell phone regarding her past due account with Defendant. In opening an account with TWC, Plaintiff and her brother provided TWC with Plaintiff's cell phone number and expressly consented to receiving past due reminder calls to her cell phone without any right to opt out of such calls. Plaintiff also agreed Defendant could make these calls using a dialing system and/or an artificial or pre-recorded voice.
- 2. Plaintiff's claims fail as a matter of law because her prior express consent to be called is a complete defense under the TCPA. The TCPA and her agreement with Defendant afford no right to revoke such consent, and Plaintiff in any event waived revocation by continuing to accept and use Defendant's services under the agreement.

- 3. Further, Defendant did not call Plaintiff using an "automatic telephone dialing system" as defined by the TCPA, and the calls fall outside the scope of the TCPA because they were not sent in bulk, randomly, or for telemarketing purposes.
- 4. In further support of this Motion, Defendant relies on the Declaration of David Zitko and Defendant's supporting Memorandum, filed contemporaneously herewith.

WHEREFORE, Defendant prays the Court for an Order granting summary judgment to Defendant, dismissing this action with prejudice, taxing the costs of this action against Plaintiff, and for such other relief that the Court deems just and proper.

This the 27th day of March 2015.

/s/ D.J. O'Brien III

D.J. O'Brien III dobrien@brookspierce.com N.C. State Bar No. 35481 BROOKS, PIERCE, MCLENDON, HUMPHREY & LEONARD, LLP 1600 Wells Fargo Capitol Center 150 Fayetteville Street Raleigh, NC 27601 Tel. (919) 839-0300 Fax (919) 839-0304

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send electronic notification of the filing to the following:

Ruth M. Allen rallen@lemberglaw.com *Attorney for Plaintiff*

This the 27th day of March 2015.

/s/ D.J. O'Brien III D.J. O'Brien III